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July 20, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Copy of Comments of AmeriFactors Financial Group, LLC
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

AmeriFactors Financial Group, LLC (“AmeriFactors”) submitted comments to the Federal Communications Commission (“Commission”) in response to a Public Notice seeking input for a staff report on robocalling that will “provide particular insight into the current state of the robocalling problem.”¹ In its comments, AmeriFactors urges the Commission to grant AmeriFactors’ Petition of Expedited Declaratory Ruling in the above-captioned proceedings (“Petition”),² and declare that “fax” advertisements the recipient receives through online facsimile services or on a device other than a “telephone facsimile machine” are not subject to the TCPA.

A copy of AmeriFactors’ comments in response to the Public Notice are enclosed with this letter.

¹ See *Consumer and Governmental Affairs Bureau Seeks Input for Report on Robocalling*, CG Docket No. 17-59, Public Notice, DA 18-638 (rel. June 20, 2018) (“Public Notice”), quoting *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9727 (2017) (“Call Blocking Order”).

² See AmeriFactors’ Petition of Expedited Declaratory Ruling, CG Docket Nos. 02-278 and 05-338 (filed July 13, 2017).

KELLEY DRYE & WARREN LLP

Ms. Marlene H. Dortch
July 20, 2018
Page 2

Kindly contact the undersigned should you have any questions regarding this submission or AmeriFactors' Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a distinct "A" and "Augustino" following.

Steven A. Augustino

*Counsel for AmeriFactors Financial Group,
LLC*

Enclosure

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Advanced Methods to Target and Eliminate)	CG Docket No. 17-59
Unlawful Robocalls)	

COMMENTS OF AMERIFACTORS FINANCIAL GROUP, LLC

AmeriFactors Financial Group, LLC (“AmeriFactors”), by its attorneys, hereby respectfully submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in response to the Public Notice seeking input for a staff report on robocalling that will “provide particular insight into the current state of the robocalling problem.”¹ As explained herein, while AmeriFactors takes no position with respect to robocalls involving voice calls or texts, it respectfully submits that the staff report should make clear that the “robocalling problem” arises only in the context of voice calls and text messages, and not fax advertisements.

AmeriFactors appreciates that robocalling is a top consumer complaint to the FCC. However, the Commission’s own empirical data and recent reports to Congress demonstrate that unlike robocalls, consumer concern about fax advertisements is barely a blip on the radar. In May 2018, for example, the Commission explained in its Report on Unsolicited Facsimile Advertisements that junk fax complaints had **declined by 95%** from their 2007-2008

¹ See *Consumer and Governmental Affairs Bureau Seeks Input for Report on Robocalling*, CG Docket No. 17-59, Public Notice, DA 18-638 (rel. June 20, 2018) (“Public Notice”), quoting *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9727 (2017) (“Call Blocking Order”).

peak.² In fact, faxing complaints between May 2017 and April 2018 averaged only 260 per month (down from even the prior year's complaints, where 348 complaints per month were received between May 2016 and April 2017).³ And since the beginning of 2018, the FCC has received only 1,593 complaints about "junk faxes" (or an average of approximately 238 complaints per month) compared to nearly 130,000 complaints about unwanted calls (including robocalls).⁴ This is fewer complaints than the Commission is receiving on other issues, such as number portability and loud commercials.⁵

This trend is not surprising, as the Commission explained in its 2018 Report on Unsolicited Facsimile Advertisements:

The decline in fax complaints follows in lockstep with Americans' shift away from fax transmission to other forms of document sharing via the Internet; some estimate that as few as 3% of American households have a device capable of receiving faxes. Moreover, as Americans abandon landline telephone service for wireless-only service, consumer use of fax machines will probably continue to decline.⁶

² Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page) (May 2, 2018) ("2018 Report on Unsolicited Facsimile Advertisements") (attached as Exhibit 1).

³ *See id.*; *see also* Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page) (May 10, 2017).

⁴ These are based on available data in the FCC's Consumer Complaint Data Center as of July 20, 2018. *See* Declaration of Jennifer Wainwright (attached as Exhibit 2).

⁵ Using the methodology described in the attached Declaration of Jennifer Wainwright, the consumer complaint data center indicates that thus far in 2018, Commission has received 1,933 complaints related to "number portability" and 2,083 complaints related to "loud commercials."

⁶ 2018 Report on Unsolicited Facsimile Advertisements at 2.

The available data and this report also underscore that junk faxing is no longer an enforcement priority at the Commission. Indeed, the 2018 Report on Unsolicited Facsimile Advertisements noted that the FCC did not enter into any consent decrees to resolve investigations related to junk faxing during the reporting period, and had not issued any citations, notices of apparent liability for forfeiture, or forfeiture orders.⁷ Given the precipitous decline in consumer complaints concerning “junk faxes” in recent years, it appears that the Enforcement Bureau is correct to focus its resources on other issues, not on junk faxes.

Accordingly, AmeriFactors respectfully submits that the upcoming staff report on robocalling should make clear that the “robocalling problem” pertains only to voice calls and text messages, and not to fax advertisements. Additionally, the Commission should take the next step and recognize the limited scope of the Telephone Consumer Protection Act of 1991 (“TCPA”) and the harms it was intended to address by granting AmeriFactors’ Petition for Expedited Declaratory Ruling filed July 13, 2017, and declaring that “fax” advertisements the recipient receives through online facsimile services or on a device other than a “telephone facsimile machine” are not subject to the TCPA.⁸

⁷ See *id.* at Appendix. The report notes that during the reporting period, the Commission “rejected a petition for reconsideration of a 2016 forfeiture order” related to alleged unsolicited fax advertisements. *Id.* at 1.

⁸ See AmeriFactors’ Petition of Expedited Declaratory Ruling, CG Docket Nos. 02-278 and 05-338 (filed July 13, 2017) (“Petition”). Comments were received on the Petition in August and September of last year. See Consumer and Governmental Affairs Bureau Seeks Comment on Amerifactors Financial Group LLC Petition for Expedited Declaratory Ruling under the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 and 05-338, DA 17-690 (rel. July 18, 2017) (seeking comments by August 17, 2017 and replies by September 1, 2017).

CONCLUSION

AmeriFactors respectfully requests that the Commission take these comments into consideration for its staff report. It further urges the Commission to expeditiously grant AmeriFactors' Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a distinct "A" and "Augustino" following.

Steven A. Augustino
Jennifer R. Wainwright
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*Counsel for AmeriFactors Financial Group,
LLC*

July 20, 2018

EXHIBIT 1



FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

REPORT ON UNSOLICITED FACSIMILE ADVERTISEMENTS

EB-TCD-18-00026339

MAY 2, 2018

Pursuant to the Junk Fax Prevention Act of 2005,¹ this report provides data regarding complaints received and enforcement activities undertaken by the Federal Communications Commission (FCC or Commission) from May 1, 2017, through April 30, 2018, with respect to unsolicited facsimile advertisements, often referred to as “junk faxes.”

In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA)² to add Section 227 to the Communications Act of 1934 (Communications Act). In addition to addressing unsolicited telemarketing and robocalls, this section prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.³ In 2005, Congress enacted the Junk Fax Prevention Act to amend Section 227 by adding an exception to the prohibition to allow fax advertisements to be sent in cases where the sender has an established business relationship with the recipient.⁴

The Junk Fax Prevention Act requires the Commission to provide certain information to Congress periodically about the agency’s junk fax enforcement activities.⁵ The attached appendix sets forth our current report of the required information and shows that between May 1, 2017, and April 30, 2018, the Commission rejected a petition for reconsideration of a 2016 forfeiture order that imposed a monetary forfeiture of \$1.84 million against a junk faxer whose unsolicited advertisements disrupted business activities and patient care at numerous health care offices.⁶

The Communications Act prescribes the type and sequence of actions that the Commission may take against those sending unsolicited facsimile advertisements. For an entity—such as most senders of junk faxes—that does not hold, or is not an applicant for, a

¹ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991).

³ 47 U.S.C. § 227(b)(1)(C). Section 64.1200(a)(4) of the Commission’s rules implements restrictions on the delivery of unsolicited advertisements to telephone facsimile machines. *See* 47 CFR § 64.1200(a)(4).

⁴ Junk Fax Prevention Act, sec. 2(a). *See also* 47 CFR § 64.1200(f)(6) (defining an “established business relationship”).

⁵ Junk Fax Prevention Act, sec. 3; 47 U.S.C. § 227(g).

⁶ *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC, Order on Reconsideration, FCC 18-14* (Feb. 15, 2018).

license or other authorization issued by the Commission (and is not engaged in activities for which an authorization is necessary), the Communications Act requires that the Commission issue a “citation” before proposing a penalty. The purpose of the citation is to alert the sender that sending a junk fax is illegal, and to warn that a future violation could lead to a civil forfeiture.

If the Commission finds that a cited party appears to have engaged in a subsequent junk fax violation, Section 503 of the Act authorizes the Commission to propose a forfeiture penalty, with a current upper limit of \$19,639 per violation for entities that do not hold, or are not applicants for, a Commission license or authorization.⁷ The specific amount of the proposed forfeiture against a particular violator depends on the application of certain factors set forth in the Communications Act and the Commission’s rules.⁸ The Commission must set forth the proposed monetary forfeiture in a Notice of Apparent Liability for Forfeiture (NAL) that describes the violation and the underlying facts. By statute, the alleged violator has an opportunity either to pay the forfeiture or to argue for a reduction or rescission of the forfeiture. If the subject of an NAL argues against the forfeiture proposed, the Commission considers the arguments raised and then issues an order either upholding all or part of the forfeiture proposed, or rescinding it. If the subject of a forfeiture order fails to pay the final forfeiture, the Communications Act requires the Commission to refer the matter to the U.S. Department of Justice (DOJ) to enforce the order for the payment of money. DOJ must file a complaint in federal district court seeking a trial *de novo* (i.e., a trial where the court considers the underlying facts anew). DOJ, therefore, makes the final decision on whether to enforce the forfeiture.

Over the past several years, the number of junk fax complaints received by the Commission has dropped dramatically. Annual complaint totals have declined by more than 90 percent from the high levels reported for 2006 to 2009. The decline in fax complaints follows in lockstep with Americans’ shift away from fax transmission to other forms of document sharing via the Internet; some estimate that as few as 3 percent of American households have a device capable of receiving faxes. Moreover, as Americans abandon landline telephone service for wireless-only service, consumer use of fax machines will probably continue to decline.

With respect to TCPA enforcement (which includes not only junk fax cases, but also do-not-call, unwanted texts, and robocall cases), the Enforcement Bureau selects its cases strategically by focusing on the cases that affect large numbers of American consumers, or that

⁷ The Communications Act specifies a maximum forfeiture in such cases of \$10,000, subject to periodic adjustments for inflation. 47 U.S.C. § 503(b)(2)(D). The current adjusted maximum is \$19,639. *Amendment of Section 1.80(b) of the Commission’s Rules: Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Rcd 46 (EB 2018).

⁸ Section 503(b)(2)(E) of the Communications Act states that “[i]n determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” 47 U.S.C. § 503(b)(2)(E). The Commission’s forfeiture guidelines identify additional criteria the Commission applies to determine whether to apply a higher or lower forfeiture. For example, the Commission may assess a higher forfeiture for egregious misconduct or repeated violations, while it may assess a lower forfeiture for a minor violation or where the violator has a history of overall compliance. 47 CFR § 1.80.

may prevent harms in the first place. In cases of demonstrated consumer harm, the Commission does not hesitate to bring enforcement actions, including assessment of penalties, such as the \$1.84 million penalty, referenced above, against a persistent and egregious junk faxer.

We hope this report is informative to Congress. We will continue to collaborate with the Commission's other Bureaus and Offices, and with outside stakeholders, to evaluate our enforcement activities on an ongoing basis in order to maximize our effectiveness in this area.

Submitted by:

A handwritten signature in black ink, appearing to read "Rosemary C. Harold". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

Rosemary C. Harold
Chief, Enforcement Bureau

APPENDIX— Data for May 1, 2017 through April 30, 2018

1. Complaints

During this reporting period, the Commission's Consumer and Governmental Affairs Bureau (CGB) received 3124 junk fax complaints, a rate of 260 complaints per month. This continues the steep decline in junk fax complaint receipts, showing a decline of nearly 95 percent from the peak of junk fax complaints during 2007 – 2008. CGB has responded to each consumer who filed a complaint, acknowledging receipt and emphasizing that although the Commission does not adjudicate individual complaints, these filings are crucial to the Commission's efforts to effectively enforce junk fax requirements and protect consumers against unwanted fax advertisements. The Enforcement Bureau reviews complaints to facilitate identification of the most serious violators although positive identification may ultimately not be possible for a number of reasons.

2. Citations, Notices of Apparent Liability for Forfeiture, Consent Decrees, Forfeiture Orders, and Orders on Reconsideration

From May 1, 2017 through April 30, 2018, the Commission dismissed, and in the alternative denied, a petition for reconsideration seeking to overturn or reduce a \$1.84 million forfeiture for junk fax violations by an individual whose advertisements for chiropractic equipment disrupted the operations of numerous health care offices.

The Commission did not issue any citations, notices of apparent liability for forfeiture, or forfeiture orders, and did not enter into any consent decrees, during the period covered by this report.

3. Referrals to the Department of Justice of Unpaid Forfeiture Penalties

When the FCC issues a forfeiture order, it generally gives the subject thirty days to pay the penalty. As with any order issued by the Commission, the Communications Act also gives the subject thirty days after the Commission gives public notice of any forfeiture order to seek reconsideration of that order.⁹ If the subject neither pays the penalty nor seeks reconsideration, the FCC then, at the request of DOJ as a prerequisite for referral, issues a demand letter, requiring payment within thirty days. If the subject still does not pay the forfeiture, the FCC prepares the pleadings for DOJ to file in court to enforce the forfeiture, and formally refers the matter to DOJ.

The length of time between the FCC's issuance of a forfeiture order and referral to DOJ may be slowed by a number of factors. If the FCC has issued, or foresees that it may issue, more than one forfeiture order against the same subject, it may defer referral of the first order until it has issued the subsequent orders. In addition, the subject of a forfeiture order may express interest in settlement at any point in the process, and consideration and

⁹ 47 U.S.C. § 405(a).

negotiation of terms affects referral timing. The Commission typically will not refer a case to DOJ while a petition for reconsideration is pending.

During the reporting period, the Commission referred one unpaid forfeiture penalty for junk fax violations to the Department of Justice for collection. This case, referenced above, seeks collection of a \$1.84 million penalty. The Department of Justice filed a complaint on February 21, 2018, and the case is pending before the U.S. District Court for the Northern District of Texas.

EXHIBIT 2

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Advanced Methods to Target and Eliminate)	CG Docket No. 17-59
Unlawful Robocalls)	

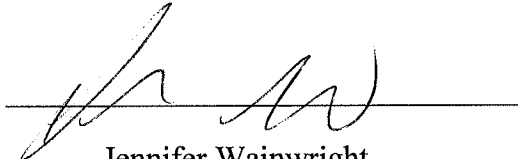
DECLARATION OF JENNIFER WAINWRIGHT

I, Jennifer Wainwright, declare as follows:

1. I am more than 18 years of age and am an associate at Kelley Drye & Warren LLP. I serve as counsel to Amerifactors Financial Group, LLC (“Amerifactors”).
2. I submit this declaration in support of the comments of Amerifactors filed with the Federal Communications Commission (FCC) on July 20, 2018 in the above-captioned proceeding. Unless expressly stated, this declaration is based on my personal knowledge.
3. In its comments, Amerifactors states that since the beginning of 2018, the FCC has received 1,593 consumer complaints about “junk faxes.” I calculated this number by visiting the FCC’s Consumer Complaint Data Center on July 20, 2018, and clicking on “Complaint Data.” Once on the “CGB – Consumer Complaints Data” page, I clicked on “View Data.” Next, I filtered the data by “Issue” such that only complaints related to “Junk Faxes” appeared in the data set. I then scrolled down the data to locate the first complaint row in 2018 (row number 12893 – filed on 1/2/18 at 10:29 AM) and the most recent complaint row in 2018 (row number 14486 – filed on 7/19/18 at 5:26 PM). Based on these row numbers, I calculated that the FCC has received 1,593 consumer complaints about “junk faxes” thus far in 2018 (14486 – 12893 = 1,593).

4. Amerifactors also states that since the beginning of 2018, the FCC has received nearly 130,000 complaints about unwanted calls (including robocalls). I calculated this number by visiting the FCC's Consumer Complaint Data Center on July 20, 2018, and clicking on "Unwanted Calls." I then scrolled down the data to locate the first complaint row in 2018 (row number 518973 – filed on 1/1/18 at 12:24 AM) and the most recent complaint row in 2018 (row number 648381 – filed on 7/19/18 at 11:59 PM). Based on these row numbers, I calculated that the FCC has received nearly 130,000 complaints about unwanted calls (including robocalls) thus far in 2018 ($648381 - 518973 = 129,408$).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States of America that the foregoing statements are true and correct.


Jennifer Wainwright

July 20, 2018